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No. 94-1202

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAMES MOTTOLA,
Petitioner,

v.

TAWA AYENI AND KAYODE AYENI,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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1. Respondents' opposition spends much time reiterating an undisputed proposition: that "[t]he *Anderson [v. Creighton,* 483 U.S. 635 (1987),] test permits finding a clearly established right even where an earlier decision is not directly on point with the current facts." Br. Opp. 9. That, however, simply begs the question presented by petitioner: whether a court is free to find a clearly established right -- a right whose contours are "sufficiently clear that a reasonable officer would understand that what he is doing violates that right," *Anderson,* 483 U.S. at 640 -- within its jurisdiction based on abstract legal principles when cases directly on point in other jurisdictions suggest that what he is doing violates no right at all. The answer is no.

Respondents argue that the Second Circuit could ignore foreign cases directly on point and find a clearly established right because petitioner's conduct was "so far from then well established acceptable constitutional behavior," *Ayeni v. CBS Inc.*, Pet. 64a, that no cases were needed to guide him. Br. Opp. 10. This argument misses the point: there *were* cases to guide Special Agent Mottola -- *Higbee v. Times-Advocate*, 5 Media L. Rptr. 2372 (S.D. Cal. 1980); *Moncrief v. Hanton*, 10 Media L. Rptr. 1620 (N.D. Ohio 1984); and *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) -- and these cases held that permitting news media to witness the execution of a warrant did not violate the United States Constitution. Respondents' contention is also substantially undermined by the pervasiveness of reality-based "cop shows" carried by the major television networks at the time of the challenged conduct.[1/]

When all is said and done, respondents press two real

[1/]Respondents are wrong that this Court cannot take judicial notice of the existence and airing of reality-based "cop shows" such as "Cops," "Top Cops," "Street Stories," "Night Beat," "American Detective," or "America's Most Wanted." Unlike the contested facts allegedly found in competing newspaper articles cited to the Court in the *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970), this information can be judicially noticed because it is both "generally known within the territorial jurisdiction of [this Court]," Fed. R. Evid. 201(b)(1), and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). *Ollman v. Evans*, 750 F.2d 970, 986 n.32 (D.C. Cir. 1984) (taking judicial notice that syndicated columns on political and social issues appear on the Op-Ed pages of newspapers), *cert. denied*, 471 U.S. 1127 (1985); *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313, 1319 (C.D. Cal. 1992) (taking judicial notice that a particular magazine article and advertisement exist); *Inc. Pub. Corp. v. Manhattan Magazine, Inc.*, 616 F. Supp. 370, 380 (S.D.N.Y. 1985) (taking judicial notice that many newsstands display magazines in a particular manner), *aff'd*, 788 F.2d 3 (2d Cir. 1986).

objections to *Moncrief*, *Higbee*, and *Prahl*. First, they protest that these decisions are not "binding" on the Second Circuit. Second, they urge that *Moncrief* and *Higbee* lack value because they are unpublished.

Both objections are misguided. Of course the Second Circuit was not bound by these cases. That is not the question. The question is whether the public policy interest in avoiding the unjust imposition of liability on government officials that lies behind this Court's qualified immunity jurisprudence permits a court to create a judicial fantasy wherein a law enforcement officer is charged with knowledge of a federal right that five judges trained in the law and engaged in a sincere effort to apply the Constitution to the situation at hand found to be nonexistent. With regard to Respondents' second objection -- that unpublished decisions lack intellectual merit -- it is sufficient to point out that this Court held in *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985), that a violated right was not clearly established because, *inter alia*, two district courts *outside the relevant jurisdiction* had upheld the challenged conduct in *unpublished* opinions. Surely a government official is not expected to devote more thought to these issues than a court of law, whether or not the court officially publishes its thought.

The "mountain of authorities" said to clearly establish respondents' right to be free from media attendance at the execution of a lawfully obtained search warrant was carefully considered in the petition. Pet. 10-11. None of the twelve cases relied on by the Second Circuit invalidated a search or seizure.[2/] Certainly none was sufficient to provide a

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[2/] *Michigan v. Summers*, 452 U.S. 692 (1981); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394 n.7 (1971); *United States v. Matias*,

(continued...)

reasonable law enforcement officer like Agent Mottola with a clear understanding that he was violating a constitutional right by permitting media representatives to witness the execution of a search warrant. Nor can decisions upholding certain uses of nongovernmental third parties to assist in the execution of a warrant be converted, as respondents contend, Br. Opp. 16, into a *clearly established* principle that the presence of nongovernmental third parties *not* assisting in the execution of a warrant violates the constitution. That proposition is a *non sequitur*.[3/]

[2/](...continued)
836 F.2d 744, 747 (2d Cir. 1988); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985); *United States v. Barlin*, 686 F.2d 81 (2d Cir. 1982); *United States v. Heldt*, 668 F.2d 1238, 1260 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982); *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980); *United States v. Gervato*, 474 F.2d 40, 45 (3d Cir. 1973), *cert. denied*, 414 U.S. 864 (1973); *United States v. Gambino*, 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990); *In re Southeastern Equip. Co. Search Warrant*, 746 F. Supp. 1563, 1577 (S.D. Ga. 1990); *United States v. Schwimmer*, 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988). The last six of these cases interpret the federal warrant statute, 18 U.S.C. § 3105, not the Fourth Amendment. Their relevance to the inquiry whether a constitutional right has been *clearly established* remains unclear. The same holds true for Fed. R. Crim. P. 41, which regulates the issuance of search warrants, and cases interpreting it.

[3/]The other cases discussed in respondents' brief, *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (Sup. Ct. Monroe Cty. 1981); *United States v. Sanchez*, 509 F.2d 886 (6th Cir. 1975); and *United States v. Warren*, 550 F.2d 219 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978), *rev'd*, 578 F.2d 1058 (5th Cir. 1978) *(en banc), on reh'g*, 612 F.2d 887 (5th Cir. 1980) *(en banc), cert. denied*, 446 U.S. 956 (1980), *overruled in part by United States v. Bengivenga*, 845 F.2d 593 (5th Cir. Tex. 1988), *cert. denied*, 488 U.S. 924 (1988), do no more to clearly establish the right respondents claim. Respondents egregiously misinterpret the holding in *WROC;* the *WROC* court found that the news crew, not the Humane
(continued...)

What is left of respondents' "mountain" of authorities at the end of the day is a rather small "molehill" of constitutional generalities, not the clear warning of illegality to which law enforcement officers are entitled before liability is imposed upon them. And, in the context of qualified immunity jurisprudence, even these generalities are less than lucid or compelling. Abstract Fourth Amendment principles provide little guidance to law enforcement officers in the field. *See Anderson,* 483 U.S. at 644 ("We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment."). Respondents have privacy interests like everyone else, but such interests can give way to society's interests when there is probable cause to suspect criminal activity, as was the case here. The Constitution's general privacy norms thus provide little useful guidance to an officer in the field making a decision about who may attend the execution of a search warrant.

Respondents argue that Agent Mottola's view "demeans the integrity of the law enforcement process by giving a 'green light' to plainly unconstitutional conduct which has not yet been brought to the attention of the courts," Br.

[3/](...continued)
Society agent they accompanied, committed a trespass. *See* 441 N.Y.S.2d at 222 (news crews' defenses at issue). The court found no violation of the Constitution whatsoever. *Sanchez* simply held that a search warrant authorizing a state officer to search for narcotics could not be used to validate a federal officer's search for explosives. 509 F.2d at 890. Similarly, *Warren* merely held that Drug Enforcement Agency agents could not search for narcotics on the general authority of the Coast Guard to board oceangoing vessels for safety inspections. 550 F.2d at 225. Neither *WROC, Sanchez,* nor *Warren* suggested that the parties with valid warrants committed a constitutional violation simply by permitting the parties lacking such warrants to accompany them.

Opp. 23, but Agent Mottola believes his position protects the integrity and efficacy of the law enforcement process by preventing unwarranted imposition of liability on law enforcement officials for conduct which is arguably unconstitutional when that conduct has been brought to the attention of several courts and those courts have not found it problematic. This Court has previously recognized that "officials who act in ways they reasonably believe to be lawful . . . should not be held personally liable" for unlawful conduct. *Anderson*, 483 U.S. at 641. This Court should grant review to prevent erosion of that protective principle.

2. Prominent authorities have noted the divisions among the circuits identified by petitioner regarding both the sources of authority to be used to determine whether a particular right is clearly established and their required level of specificity. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6 (2d ed. 1994); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.07 (3d ed. 1994). Contrary to respondents' contentions, the Second, Sixth, Tenth, and Eleventh Circuits rely on a narrower evaluation of existing cases than that employed by other circuits to ascertain whether a particular right is "clearly established" for purposes of eliminating a state actor's qualified immunity. While the Second Circuit here did in fact consider general constitutional cases from other jurisdictions *supporting* its view that the right claimed by respondents was clearly established in the Second Circuit, it *completely ignored* cases from other jurisdictions -- the only cases directly on point -- which found that the right claimed by respondents does not exist. The overarching justification for this selectivity, if there is one, may be found in the Second Circuit's view that clear establishment is essentially a "local" exercise. *See, e.g., Richardson v. Selsky*, 5 F.3d 616 (2d Cir. 1993) ("To be sure, by 1985, other circuits had begun to adopt various approaches . . . However,

as of March 1985, when [plaintiff's] disciplinary hearing was held, in this Circuit the contours of his claimed federal rights . . . were not clearly delineated."); *Russell v. Scully,* 15 F.3d 219 (2d Cir. 1993), *on petition for rehearing,* 15 F.3d 222, 223-24 (1994); *Soares v. State of Connecticut,* 8 F.3d 917, 922 (2d Cir. 1993).

Respondents unsuccessfully try to conflate the methodology used in the Second, Sixth, Tenth, and Eleventh Circuits with that employed by the other circuits by showing that the former too permit reference to the laws of other jurisdictions. This is true, but only in restricted circumstances. As noted in the petition, the Sixth Circuit permits establishment by other courts "[i]n an extraordinary case." *Ohio Civil Serv. Employees Ass'n v. Seiter,* 858 F.2d 1171, 1177-78 (1988). The Tenth Circuit considers the law in other circuits, but such cases generally lack effect unless they represent the "clearly established weight of authority from other courts." *Woodward v. City of Worland,* 977 F.2d 1392, 1397 (10th Cir. 1992) (rejecting claim that right was clearly established in 1987 despite cases in the Third and Seventh Circuits and several district courts holding to the contrary), *cert. denied,* 113 S. Ct. 3038 (1993). And as respondents concede, Br. Opp. 28-29, the Eleventh Circuit accords little weight to foreign precedent for purposes of determining whether a particular right is clearly established. *Belcher v. City of Foley,* 30 F.3d 1390, 1400 (11th Cir. 1994) (rejecting clear establishment despite Fifth and Ninth Circuit cases to the contrary).

This Court recently decided that lower courts should rely on "full knowledge of [their] own [and other relevant] precedents," rather than just the precedents presented by the parties, to determine whether a particular right was clearly established. *Elder v. Holloway,* 114 S. Ct. 1019, 1023 (1994). Respondents argue that this resolves any disagreement

among the circuits regarding petitioner's claims. In petitioner's view, *Elder v. Holloway* begs rather than resolves the two circuit-dividing questions behind Agent Mottola's petition: What are the "other relevant precedents" upon which a court may (or must) rely, and may a court ignore case law from other jurisdictions which is directly on point in favor of more general case law in its own jurisdiction which suggests a contrary result? This court should grant review to consider these important questions on which the courts are divided.

CONCLUSION

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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